A

YUSOF RAHMAT

v.

BUMIPUTRA-COMMERCE BANK BHD

B

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 1-12-5-2004]
27 NOVEMBER 2006

C ***CIVIL PROCEDURE:*** *Summary judgment - Appeal against - Grounds - Validity of agreement - Whether a triable issue - Subordinate Courts Rules 1980, O. 26A*

CIVIL PROCEDURE: *Summary judgment - Appeal against -*
D *Grounds - Accuracy of statement of account - Whether deemed correct - Whether a triable issue - Subordinate Courts Rules 1980, O. 26A*

CIVIL PROCEDURE: *Summary judgment - Appeal against - Grounds - Delay in application - Allegation of - Explanation of delay given in affidavit in support - Whether reasonable and probable -*
E *Whether a triable issue - Subordinate Courts Rules 1980, O. 26A*

This appeal was lodged by the appellant-defendant ('the defendant') against the decision of the sessions court judge who had entered summary judgment in the sum of RM58,371.51
F against him under O. 26A of the Subordinate Courts Rules 1980. The respondent-plaintiff ('the plaintiff') had *vide* letter of offer dated 3 May 1995, approved the defendant's application and offered to the defendant overdraft facility with a limit of RM50,000 subject to the terms and conditions stated therein. On
G 6 June 1995, the defendant executed a written acceptance of the terms and conditions of the plaintiff's offer. On 8 June 1995, the defendant executed a letter of undertaking on a full indemnity basis to pay the plaintiff all moneys and discharge all obligations and liabilities due and owing in relation to the facility together with
H interest, charges, costs and expenses incurred by the plaintiff. Upon the defendant's default, the plaintiff instructed solicitors to issue to the defendant a letter dated 10 December 2001 demanding payment of the outstanding sum of RM56,619.63 together with interest and other charges due and owing to the
I plaintiff. As the defendant had failed, refused and neglected to

comply with the said letter of demand, the plaintiff had on 1 April 2002 commenced an action against the defendant, and on 18 July 2003 filed notice of application seeking the said summary judgment which the plaintiff had obtained against the defendant who now filed this appeal. In his submission, the defendant questioned the validity of the agreement brought about by the plaintiff's letter of offer on 3 May 1995 and the defendant's acceptance thereof on 6 June 1995, which was beyond the 30 days prescribed in the plaintiff's letter of offer and contended that this was a triable issue. The defendant also queried the accuracy of the plaintiff's statement of account, submitting that this was also a triable issue. Further, the defendant argued that in filing the application for summary judgment the plaintiff had caused an unexplained delay of 17 months after the commencement of this action, or nine months since the defence had been filed and so was precluded from obtaining summary judgment.

Held (dismissing defendant's appeal with costs):

(1) The plaintiff's letter of offer had requested the defendant to indicate his acceptance by signing and returning the duplicate thereof within 30 days from the date of the offer *ie*, 3 May 1995 which should be on 3 June 1995, failing which the offer shall be deemed to have lapsed. The fact that the defendant had indicated his acceptance by signing and returning in on 6 June 1995 did not *ipso facto* render the acceptance invalid. The above time frame of 30 days created a rebuttable presumption that the offeror reserved the right to revoke the offer on and after the 31st day but that did not preclude the offeror from waiving that right for the benefit of the offeree who was the defendant as had been done in this case. The delay of three days occasioned by the defendant in signing and returning the acceptance with specific reference to the plaintiff's letter of offer dated 3 May 1995 meant that the defendant had by his own conduct rebutted the presumption of the lapse of the plaintiff's offer. The defendant had, notwithstanding his own delay, indicated an absolute and unqualified acceptance in the form of a written document. The resulting overdraft which the plaintiff had given to the defendant meant that the plaintiff had waived its right to treat the offer as having lapsed. The consensus *ad idem* achieved by

A the parties herein was undoubted. There was no law to support the defendant's contention that the agreement was invalid. In law and in fact, the defendant was estopped from raising this issue and even if it had been raised, this court was unable to sustain it as a triable issue. (paras 12, 13 & 15)

B

(2) The statement of account was endorsed with an express clause to the effect that all balances shown therein were deemed correct unless the plaintiff as the bank had been informed of any discrepancy within 14 days thereof. At all C material time, the defendant had never raised the issue of any inaccuracy of the plaintiff's statement of account, which was therefore deemed to be correct. Further, at all material time, until the commencement of the action herein, there was no complaint by the defendant that the sum stated in the letter D of demand issued by the plaintiff's solicitor was manifestly incorrect. Hence, this court did not consider the issue raised for the defendant herein as a triable issue. (paras 19, 20 & 21)

E **(3)** In para 14 of the plaintiff's affidavit in support, it was clearly explained that the delay was due to the defendant's effort in collating and collecting the documents in connection with the action herein, which was accepted as reasonable and probable. The delay point raised for the defendant was without merits. In the absence of any triable issue, the decision of the court F below was correct and is hereby affirmed. (para 33)

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

G *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co Ltd [1969] 2 MLJ 98* ***(refd)***

Eng Mee Yang & Ors v. V Letchumanan [1979] 2 MLJ 212 ***(refd)***

Krihnamurthy Nagaratnam & Anor v. The Malayan Finance Corp Bhd [1986] 1 CLJ 541; [1986] CLJ (Rep) 170 SC ***(refd)***

Loo Sze Kin v. Cheong Choy Teik [1997] 4 MLJ 537 HC ***(refd)***

H *McLardy v. Slateum [1890] 24 QBD 504* ***(refd)***

Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York [1998] 1 CLJ 424 CA ***(refd)***

Public Bank Bhd v. Mohd Nadzri A Halim [2003] 7 CLJ 235 HC ***(refd)***

Societe Des Etains De Bayas Tudjuh v. Woh Heng Mining Kongsi [1978] 2 MLJ 267 ***(refd)***

I

Legislation referred to:
Subordinate Courts Rules 1980, O. 14, O. 26A

For the plaintiff - Nurul Huda; M/s Yusof Rahmat & Co
For the defendant - Shamsul Iskandar Mohd Akin; M/s Othman Hashim & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Appeal

[1] This appeal was lodged by the appellant-defendant ("the defendant") against the decision of the learned sessions court judge who had on 30 December 2003 entered summary judgment in the sum of RM58,371.51 as at 6 March 2002, with interest and costs against him under O. 26A of the Subordinate Courts Rules 1980.

Factual Background

[2] The respondent-plaintiff ("the plaintiff") has *vide* letter of offer dated 3 May 1995 approved the defendant's application and offered to the defendant overdraft facility with a limit of RM50,000 subject to the terms and conditions stated therein.

[3] The defendant is a senior advocate and solicitor of the High Court of Malaya and, according to the Bar Council's Legal Directory, was admitted to and enrolled as such on 21 December 1991, with the credit of 15 years standing.

[4] The defendant has on 6 June 1995 executed a written acceptance of the terms and conditions of the plaintiff's offer.

[5] On 8 June 1995, the defendant executed a letter of undertaking on a full indemnity basis to pay the plaintiff all moneys and discharge all obligations and liabilities due and owing in relation to the facility together with interest, charges, costs and expenses incurred by the plaintiff.

[6] Upon the defendant's default, the plaintiff instructed solicitors to issue to the defendant a letter dated 10 December 2001 demanding payment of the outstanding sum of RM56,619.63 together with interest and other charges due and owing to the plaintiff as at 8 November 2001.

[7] As the defendant had failed, refused and neglected to comply with the said letter of demand, the plaintiff had on 1 April 2002 commenced an action against the defendant, and on 18 July 2003 filed notice of application seeking the said summary judgment which the plaintiff had obtained against the defendant who has now filed this appeal.

Function Of Judge Under O. 14

[8] The function of a judge hearing an O. 14 application has been set out in the majority judgment delivered by Mohamed Azmi SCJ (as he then was) for the then Supreme Court in *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14, where the salient principles may be stated as follows:

(1) Basic to the application is the requirement under O. 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable;

(2) The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court;

(3) On the treatment of conflict of evidence on affidavits, although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statement by the same deponent, or inherently improbable in itself it may be, following the advice delivered for the Privy Council by Lord Diplock in *Eng Mee Yang & Ors. v. V. Letchumanan* [1979] 2 MLJ 212 at p. 217;

(4) Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit; and

(5) Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.

[9] Mindful of these principles, I shall now proceed to consider the issues raised herein.

Validity Of Agreement

[10] Defendant's learned counsel Mr. Shamsul Iskandar Mohd Akin questioned the validity of the agreement brought about by the plaintiff's letter of offer dated 3 May 1995 and the defendant's acceptance thereof on 6 June 1995, which was beyond the 30 days prescribed in the plaintiff's letter of offer and contended that this is a triable issue.

[11] It was submitted for the plaintiff that there was a valid agreement between the plaintiff and the defendant notwithstanding the fact that the defendant has accepted the plaintiff's offer beyond the 30-day period prescribed in the plaintiff's letter, as it was the defendant's intention to enter into a contract with the plaintiff so as to obtain an overdraft facility.

[12] In my judgment, it is true that the plaintiff's letter of offer has requested the defendant to indicate his acceptance by signing and returning the duplicate thereof within 30 days from the date of the offer ie, 3 May 1995 which should be on or before 3 June 1995, failing which the offer shall be deemed to have lapsed. The fact that the defendant has indicated his acceptance by signing and returning it on 6 June 1995 does not *ipso facto* render the acceptance invalid.

[13] The above time frame of 30 days prescribed by the plaintiff creates a rebuttable presumption that the offeror reserves the right to revoke the offer on and after the 31st day but that does not preclude the offeror from waiving that right for the benefit of the offeree who is the defendant, as has been done in this case. The

delay of three days occasioned by the defendant in signing and returning the acceptance with specific reference to the plaintiff's letter of offer dated 3 May 1995 means that the defendant has by his own conduct rebutted the presumption of the lapse of the plaintiff's offer. The defendant has notwithstanding his own delay, indicated an absolute and unqualified acceptance in the form of a written document. The resulting overdraft which the plaintiff has given to the defendant means that the plaintiff has waived its right to treat the offer as having lapsed. The consensus *ad idem* achieved by the parties herein is undoubted. I am unable to find any law to support the defendant's contention that the agreement is invalid.

[14] The plaintiff's case is clearly strengthened and by analogy, the defendant's contention is demolished by the defendant's superseding execution of the letter of undertaking dated 8 June 1995 to pay the plaintiff on a full indemnity basis, pursuant to which the defendant has enjoyed the overdraft facility until the action herein.

[15] It does not lie in the mouth of the defendant to say that his own delay in signing and returning the written acceptance has rendered the agreement invalid so as to exonerate him from the liability in the repayment of the overdraft to the plaintiff. In law and in fact, the defendant is estopped from raising this issue, and even if it has been raised herein, I am unable to sustain it as a triable issue.

Sum Claimed By Plaintiff

[16] It was argued for the defendant that the plaintiff's claim was for RM58,371.51 as at 6 March 2002 in exh. A of the plaintiff's affidavit in support but the opening balance showed a sum of RM57,969.69 as at 20 February 2002 and the amount came to RM58,819 on 31 March 2002. The defendant queried the accuracy of the plaintiff's statement of account, submitting that this is a triable issue, on the authority of *Public Bank Berhad v. Mohd Nadzri A Halim* [2003] 7 CLJ 235, 247.

[17] The response of the plaintiff was that prior to the action herein, the defendant had never complained of any inaccuracy in the plaintiff's statement of account and that the plaintiff's claim is clear and unambiguous.

[18] On my part, a perusal of all the contemporary documents would provide an answer to the defendant's argument.

[19] In this overdraft account, the plaintiff has sent the monthly statement of account to the defendant. For this purpose, the statement of account was contained in exh. A annexed to the plaintiff's affidavit in support. It showed a closing balance of RM58,371.51 as at 28 February 2002, which figure remained the same as at 6 March 2002. This statement of account is endorsed with an express clause to the effect that all balances shown therein are deemed correct unless the plaintiff as the bank has been informed of any discrepancy within 14 days thereof. It is to be noted that at all material time, the defendant has never raised the issue of any inaccuracy of the plaintiff's statement of account, which is therefore deemed to be correct.

[20] The defendant's acceptance of the overdraft facility was subject to the terms and conditions set out in the plaintiff's letter of offer dated 3 May 1995. One of these conditions is to be found in para 23 which provides that the plaintiff's (bank's) calculation of the amount due shall be conclusive unless manifestly incorrect. Plaintiff's solicitor had *vide* letter dated 10 December 2001 to the defendant demanded payment of the sum of RM56,619.63 as at 8 November 2001. At all material time, until the commencement of the action herein, there was no complaint by the defendant that the sum stated in the letter of demand issued by the plaintiff's solicitor was manifestly incorrect.

[21] In *Mohd Nadzri A Halim, supra,* cited for the defendant, the plaintiff claimed a sum of RM1,351,424.03 when the overdraft facility was for RM500,000. Abdul Malik Ishak J held that it was certainly a triable issue. Another triable issue was that the plaintiff had sent the letters of demand to the defendant at the wrong address. The facts of the case there did not allude to the existence of the deeming provisions pertaining to the correctness and accuracy of the plaintiff's statement of account. Hence, I am unable to see the usefulness of that authority to the defendant. I do not consider the issue raised for the defendant herein as a triable issue.

A **Plaintiff's Delay**

[22] The defendant said that in filing the application for summary judgment the plaintiff has caused an unexplained delay of 17 months after the commencement of this action, or nine months since the defence has been filed and so was precluded from obtaining summary judgment, referring to *Societe Des Etains De Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267 HC; *Krihnamurthy Nagaratnam & Anor v. The Malayan Finance Corp. Bhd* [1986] 1 CLJ 541; [1986] CLJ (Rep) 170 SC and *Loo Sze Kin v. Cheong Choy Teik* [1997] 4 MLJ 537 HC.

[23] The plaintiff countered that the delay has been explained in para 14 of the plaintiff's affidavit in support and so the delay did not disentitle the plaintiff from obtaining summary judgment, citing *Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York* [1997] 3 MLJ 818.

[24] It is appropriate for me to analyse the three authorities cited for the defendant.

[25] In *Societe Des Etains, supra,* the plaintiff, *vide* writ issued on 8 July 1977 and served on 29 July 1977, claimed payment of the sum of RM33,278,41 due on a permit to mine executed in favour of the defendants over certain mining lands. The defendant *vide* defence and counterclaim dated 12 August 1977 counterclaimed for damages and the return of the sums of RM11,750 and RM4,504.60 paid by them. The plaintiff took out the application for summary judgment on 16 August 1977. Abdoolcader J (later SCJ) applied *McLardy v. Slateum* [1890] 24 QBD 504 where the Divisional Court held that, though it was the intention of the rules that the application should be made before a defence had been delivered in ordinary course, the plaintiff was not precluded from making it afterwards, but that in such an event the onus is cast on the plaintiff of showing why he did not apply sooner.

[26] *McLardy, supra,* was also followed by Raja Azlan Shah J (now HRH the Sultan of Perak) in *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co. Ltd* [1969] 2 MLJ 98 and by Salleh Abas LP (as he then was) in *Krishnamurthy Nagaratnam, supra,* where the relevant facts revealed that the finance company ie, the plaintiff had sued five defendants for the recovery of RM66,303.89 in connection with a business deal. The

defendant had never filed their defence although they had entered their appearance. Subsequently on 31 May 1984, the plaintiff took out an application for summary judgment. One of the objections raised for the defendant was the plaintiff's delay in the application. Although the then Supreme Court had applied *McLardy, supra,* it did not think that the delay in that case was such as to inhibit the court from granting the plaintiff's application for summary judgment.

[27] In *Loo Sze Kin, supra,* one of the issues raised before Ian Chin J was whether the court was precluded from considering the merits of the plaintiff's application for summary judgment when it was not timeously made and there was no explanation for the delay. The learned judge noted that:

(1) O. 14 does not spell out the time in which the application must be made and thus does not prohibit an application after a defence is filed, let alone proscribing an application after a defence is delivered;

(2) *McLardy, supra,* when examined, did not advert to the very important consideration of the objective which the English O. 14 sought *inter alia* to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to the plaintiffs who were endeavouring to enforce their rights;

(3) No construction of O. 14 should have the effect of defeating the objective for which O. 14 sought to achieve and any construction having that effect cannot be effective;

(4) *McLardy, supra,* cannot be a sound decision for our courts to follow; and

(5) Although he disagreed with the Supreme Court judgment in *Krishnamurthy, supra,* he must follow it and can only hope and yearn for a change of view from the highest court of the land.

[28] Ian Chin J's view had eventually been vindicated by the Court of Appeal in *Perkapalan Shamelin, supra,* where the plaintiff had on 11 August 1993 issued the writ against the defendant and the defendant entered appearance and defence thereto. Subsequently, on 23 February 1994, the plaintiff took out a summons for

summary judgment and the defendant was given conditional leave to defend. The defendant appealed on the ground that the plaintiff had been guilty of delay in applying for summary judgment.

[29] In dismissing the appeal, two judgments were delivered for the Court of Appeal.

[30] Gopal Sri Ram JCA held at p. 821C that there is nothing to suggest that an application for summary judgment may be defeated solely on the ground that there has been a delay in moving the court, adding that such a proposition runs counter to the interests of justice, and that delay can surely provide no answer to an application under O. 14 where there are no *bona fide* triable issues. The learned judge explained that Raja Azlan Shah J (now HRH the Sultan of Perak) in *Weng Lok Mining Co Ltd, supra,* had granted a summons for summary judgment taken out about three months after appearance had been entered to the writ, as the issues raised for the defendants were a sham.

[31] At pp. 822 and 823, NH Chan JCA (as he then was) in completely agreeing with Gopal Sri Ram JCA amplified that:

(1) an application for leave to sign judgment under O. 14 r. 1 need not necessarily be made before the defendant has delivered his defence, and that in *McLardy, supra,* the plaintiff was successful in obtaining judgment under O. 14 a month after the defence was served;

(2) Delay in applying for O. 14 is no ground for defeating the plaintiff's right to summary judgment if there is no real defence disclosed;

(3) The dictum of Pollock B in *McLardy, supra,* had been given unnecessary and excessive prominence by Abdoolcader J (later SCJ) in *Societe Des Etains, supra;*

(4) In *McLardy, supra,* there was no explanation given by the plaintiff for the delay in applying for O. 14, yet he succeeded in obtaining judgment under the rule;

(5) The judgment of Salleh Abas LP (as he then was) on the delay point in *Krishnamurthy, supra,* was only *dicta* as "no defence was ever filed by the appellants and other defendants" in that case and the plaintiff was successful in obtaining judgment against the defendants.

[32] It is abundantly clear to me that the three authorities cited for the defendant actually militate against the defendant's own contention.

[33] In any event, para 14 of the plaintiff's affidavit in support has clearly explained that the delay was due to the defendant's effort in collating and collecting the documents in connection with the action herein, which I accept as reasonable and probable.

[34] In the circumstances, the delay point raised for the defendant is without merits.

Conclusion

[35] In the absence of any triable issue, I am of the view that the decision of the court below is correct and is hereby affirmed. I therefore dismiss the defendant's appeal herein with costs.